The Central Law Journal.

ST. LOUIS, JUNE 3, 1881.

CURRENT TOPICS.

Ex-Justice Strong, of the Federal Supreme Court, has recently made a valuable contribution to the discussion, on the subject of the overcrowded state of the docket of that court, and the proposed remedies for it, in the shape of an article in the May number of the *North American Review*, entitled "The Needs of the Supreme Court."

He begins by briefly sketching the growth of the volume of litigation in that court from 1801, when John Marshall was appointed Chief Justice, and the number of cases brought into it for adjudication was only ten, down to the October session of 1880, when the cases set down for trial numbered no less than eleven hundred and fifty-two, with a prospect of increase at the coming October session. "The consequences of this are obvious. Cases can not be heard within less than two and a half to three years after they have been brought into the court. Suitors are thus unreasonably delayed, and there is some foundation for the complaint, now often heard, that justice is practically denied." From 1801 to 1836, when Roger B. Taney succeeded Marshall as Chief Justice, the number of cases brought into the court per annum, both appeals and writs of error, ranged from twenty-four to fifty-eight. From 1830 to 1850 the increase was very gradual. "Within the five years ending with 1850, the number of cases brought into the court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The court was then able to dispose of its entire docket during a session of three months. But since the year 1850, the increase has been much more rapid. Within the five years ending with 1880, the number of new cases has been nineteen hundred and fifty-five, averaging more than three hundred and ninety-one each year. This exhibits, certainly, a very remarkable increase, serious in its consequences." * * * * "The business of the court has reached such dimensions that relief is indispensable. Notwithstanding the utmost efforts of the judges, though, in addition to their circuit court duties, they sit in bank seven months of each year, instead of three as formerly, though for years past, as a rule, they work from an early hour in the morning to a late hour at night, not less than from eight to twelve hours a day, they have not been able to hear and decide the cases upon their argument list, nor even to prevent a steady accumulation of undecided cases from term to term. When the court rises (usually in May) and the judges leave for their circuits, there is always a greater number of *remanets* than there was at the close of the term in the next preceding year."

The causes of this increase in the volume of business in the court may be briefly stated as: 1. The increase of our population and wealth, and the great extension of our inhabited territory. 2. The questions which grew out of the civil war, and out of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. 3. The discovery of mines, and the great and growing extent of mining interests. 4. The enormous development of railroad interests, the railroads overleaping State lines, and absorbing largely the transportation and property of the country. 5. The organization of the Court of Claims, in which suits may be directly brought against the government, — suits removable by appeal into the Supreme Court. 6. The increase of the territorial courts, the judgments of which are necessarily reviewable in the Supreme Court. 7. Numerous acts of Congress since 1850, enlarging the jurisdiction of the Federal Circuit Courts. 8. The enactment of many additional provisions for the removal of causes from the State courts to the Federal Circuit Courts, through which many of them are brought into the Supreme Court for final adjudication.

Having sketched the difficulties under which the Supreme Court labors, and pointed out the causes from which they arise, the article then proceeds (after premising that the remedy cannot ensue from the court itself but that, if found anywhere, it must come from the action of Congress), to discuss the various suggested measures of relief. The first of these proposes only an increase of the number

of the judges to twelve. The ex-justice is of the opinion that this change would not lessen the embarrassment under which the court labors. The number of opinions which each is required to write would, indeed, be lessened. But the chief labor of the court does not consist in writing opinions. The time occupied in hearing causes would necessarily be the same for a court of twelve judges, as for nine. On the other hand, the examination of the record, after the argument has closed, the analysis of the cases, the investigations of authorities, the formation of judgments, and the ascertainment of the reasons upon which the judgment should rest, which form the great bulk of the labors of the court, and which must be done by each of the justices independently of the labors of his colleagues, would require more time for a bench of twelve judges than for one of nine, while the difficulty of harmonizing the views of the various members of the court by conference and discussion, would manifestly be increased.

The second plan, proposed, is more radical. "It is to add twelve justices to the number of which the court is now composed, making the entire number twenty-one, and dividing them into sections of seven each, thus practically constituting three courts. The plan proposes that there shall be assigned to each section, as near as may be, an equal share of the business of the entire court, in such a manner, however, that particular classes of cases shall be given to one section, and other classes to the other sections severally, saving only that records, which require a construction of the Constitution or a statute of the United States, or of a treaty therewith, and causes removed by writ of error from the highest court of any State, shall be considered by the whole court in general session. Under this plan, each section or division is to sit by itself, and hear the argument upon the cases assigned to it, pronouncing judgments thereon, though the judgments are to be reported to the full bench, and there made final. This is substantially the reorganization proposed in a bill introduced by Mr. Manning, of Mississippi, into the House of Representatives on the 26th of January, 1880, and referred to the judiciary committee, from which no report has yet been made. The bill provides that if all, or six-sevenths, of the justices assigned to the division before which a case, or cause, is argued, concur in the judgment thereon, such judgment when reported to the full bench, shall be final, and not reviewable; but that if less than six-sevenths of the members of the division concur in the judgment, the case may be reheard in another division. If the judgments, of the two divisions do not agree, the case may be again heard and adjudicated in the third division, and at the discretion of the court the cause may be reheard by all the justices in general session."

"The objections to such a scheme as this are too many and too obvious to admit of its finding many advocates," says Mr. Strong, and we may add that they are too obvious to justify our dwelling upon them at any length here. Briefly, however, they are as follows: 1. The scheme is of questionable constitutionality, the judicial power being vested in *one* Supreme Court (contemplating but one), and such inferior courts as Congress may, from time to time establish. 2. The judgments of a section of the court would not command the respect or confidence of the public, or of suitors, equally with the judgments of the entire court. 3. There would be a probability of a want of harmony in the opinions and judgments of the different sections. 4. All cases involving a construction of the Federal Constitution, treaties and statutes, and of all cases brought up by writ of error to the highest court of any State would be tried before the full bench of the twenty-one judges. "For such a duty a court so large is not the best fitted. Its deliberations would be too much like those of a town meeting. A sense of personal responsibility is sometimes lost when an individual is associated in action with many others. And the results of observation certainly are, that the ability and efficiency of a court are greatest when the number of its judges is not large."

Another plan has been proposed which is regarded by the learned ex-justice as less objectionable, and which he thinks "would effectually relieve the Supreme Court, and enable it to answer all the purposes of its creation, while, at the same time, it would afford a much needed relief to the several circuit courts, and insure generally a speedy and correct administration of justice. It is the es-

tablishment of a Court of Appeals in each of the nine circuits into which the country is divided — a court intermediate between the Supreme Court and the circuit courts. The details of the plan, as they have been proposed, are various. They all contemplate, however, having the new courts constituted, either entirely of the Supreme Court justice assigned to the circuit and two or three circuit judges, with, perhaps, some district judges, or of circuit judges alone, or of circuit judges associated with some district judges. The plan further contemplates that appeals may be taken to this intermediate court from the circuit courts in all cases proper for appeals, and that writs of error may be sent from it to these courts in proper cases for such writs; but that no appeal shall lie from any circuit court to the Supreme Court, nor any writ of error be sent from the Supreme Court to any circuit court, except in cases hereafter to be noticed. Judgments or decrees in the Court of Appeals are to be reviewable in the Supreme Court only when the amount in controversy in the case exceeds the sum of $10,000, or when the case requires the construction of the Constitution, or a treaty, or a statute of the United States, or when the court shall certify that the adjudication involves a legal question of sufficient general or public importance to make it advisable that the final decision should be made by the Supreme Court, or where a writ of error, or an appeal, may be specially allowed by a justice of that court. Patent and copyright cases, also, without regard to the sum in controversy, by the plan suggested, are to be reviewable, as now, in the Supreme Court, and cases from the territorial courts are to be reviewable as now. Writs of error, also, are to be sent, as now, directly from the Supreme Court to the highest courts of the States in cases where, by the Constitution and laws of the United States, the judgments of those courts are reviewable in the Federal Supreme Court."

We have not sufficient space for a further discussion of this subject. We will say, however, that we agree with the views of ex-justice Strong, and approve of the last mentioned plan. It is plain that in nature of things there is a limit to the amount of business which can be transacted by any one court, no matter how numerous its members, if each of the persons who compose it is to give his individual attention to each case that comes before it, which is unquestionably the only proper way for a bench of judges to arrive at a conclusion. This being admitted it follows that the relief must come in the way of limiting the amount of business which comes before the court. The most obvious, direct, and perhaps only effectual way of accomplishing this end is to interpose the barrier of an intermediate appellate conrt, through which much of business that goes to the Supreme Court may be sifted, with the additional check of a pecuniary limit upon the right of appeal.

PROOF OF HANDWRITING.

In the treatment of this question no attention will be paid to that simplest and most obvious proof of handwriting, which is found ed upon the testimony of a witness, who saw the papers or signature in dispute actually written. This mode of proof being excepted, the subject becomes very difficult. In the words of Lord Coleridge, "There is nothing so difficult to put beyond question as the fact that a particular instrument, which the witness has not seen to be signed, was signed by a particular person." Especially is there uncertainty in the law respecting what was formerly termed "comparison of hands." A difference used to be made between civil and criminal cases; but at the present time, though the courts would doubtless insist upon greater care in construing the testimony in criminal prosecutions, the rules for admission are substantially the same.

"In general, to prove the handwriting of a person," says Starkie," any witness may be called who has by sufficient means acquired such a knowledge of the general character of the handwriting of the party, as will enable him to swear to his belief that the handwriting in question is the handwriting of that person." [1] The question hereupon arises, what are "sufficient means?" From a comparison of text-books and decisions, it seems possible to group the modes of proving handwriting, when no witness can be called who saw the

[1] 2 Stark. Ev. 651.

document or signature in question written, under three heads, as follows: (*a*) by a witness who has at some time seen the party write; (*b*) by a witness who has had business correspondence with the party; and (*c*) by a comparison of hands (technically so called). The first two methods are very ancient; the last is comparatively recent, and its limits cannot yet be said to be fully determined. A general rule, applicable to proof of handwriting, may be stated in these words: "Where a witness in his deposition swears positively to the handwriting of an individual, it is sufficient," and it is for the "party against whom he is called to inquire into his means of knowledge."[2] The methods of proof above given will next be particularly considered.

The testimony of a witness who has seen the party write, is competent. It, of course, varies in weight according to the number of times the witness has seen the party write, and the length of time which has elapsed since the last occasion, but it is always submitted to the jury.[3] The testimony is even admissible, if the witness has seen the party write but once, and then only his surname.[4]

The rule as to knowledge founded upon business correspondence, though less clearly defined, seems now firmly established. It is well stated in Stephen's Digest, sec. 51: "A person is deemed to be acquainted with the handwriting of another person * * * * when he has received documents purporting to be written by that person, in answer to documents written by him, or under his authority, and addressed to that person, or when, in the ordinary course of business, documents, purporting to be written by that person, have been habitually submitted to him." Phillips,[5] Starkie[6] and Greenleaf consider such evidence fully competent. At the time of the trial of the Seven Bishops, the witness must have actually seen the person write, to be competent in criminal cases. The rule as stated by Stephen will, in most cases, cover a purely personal correspondence. Upon the question whether additional testimony is necessary to prove the identity of the person, the cases are somewhat contradictory. The tendency of the text-books is to agree with Greenleaf in stating the rule: "By having seen bills or other documents purporting to be in the handwriting of the party, and having afterwards personally communicated with him respecting them; or acted upon them as his, the party having known and acquiesced in such acts founded upon their supposed genuineness; or by such adoption of them in the ordinary business transactions of life as induces a reasonable presumption of their being in his own writing: evidence of the identity of the party, being, of course added *aliunde*, if the witness be not personally acquainted with him."[7]

It may fairly be said that the weight of authority in the decisions agrees with the text-books in pronouncing this additional testimony requisite.[8] In Doe v. Suckermore,[9] it was said: "The knowledge may have been acquired * * * * by any mode of communication between the party and the witness, which in the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were in the handwriting of the party, evidence of the identity of the party being of course added *aliunde*, if the witness is not personally acquainted with him."

Each of the two methods which have been considered, is in some sense, a comparison of hands. It differs, however, from the method to which this name has been especially applied, in that the last involves a comparison of the handwriting in which one paper or name is written with that in which another paper or name is written, both papers or names being actually in the hands of the witness; while by the first two the handwriting of a paper or name is compared with a mental impression, which the witness has received from a more or less extended acquaintance with the handwriting of the party in whose handwriting the paper or name is clained to be.

[2] Goodhue v. Bartlett, 5 McLean, 186.

[3] Steph. Dig. Ev. § 51; 2 Starkie Ev. 651; 1 Greenleaf Ev. 577: Meyer v. Osborn, 32 N. Y. 669.

[4] Doe v. Suckermore, 5 Adol. & El. 703; Garrels v. Alexander, 4 Esp. 37; Powell v. Ford, 2 Stark. N. P. C. 164; Lewis v. Sapis, M. & M. 39.

[5] 1 Phillips Ev. 367.

[6] 2 Starkie Ev. 652.

[7] 1 Greenleaf Ev. 577.

[8] Burr v. Harper, Holt's Cases, 420; Pope v. Askew, 1 Ired. 16; Clarke v. Freeman, 25 Pa. St. 133; Johnson v. Dawson, 19 Johns. 134: Thorpe v. Gisborne, 2 Carr & Payne, 21; Doe v. Suckermore, Adol. & El. 703; Lord Ferris v. Shirley, Fitzg. 195; Buller N. P. 236; Harrington v. Fry, R & M, 90.

[9] 5 Adol. & El. 703.

Upon the third mode of proving handwriting, one can not but wish that our law had the preciseness of the French Code. The *Code de Procedure*[10] defines not only the persons who are to make the comparisons—sworn experts, three in number, appointed by the court, or agreed on by the parties—but also the writing to be submitted to them for comparison with the writing in dispute. These writings must either be of a public nature, made before a notary or judge, etc., or papers written and signed in some public capacity, or, if private papers, they must be admitted in the cause, by the party to whom they are attributed, to be of his own handwriting; a previous admission of them, or previous proof will not make them competent. I have been thus particular with the French rule, for I think that it furnishes a basis for reconciling the American decisions, and is, as will be seen, very similar to the law as decided to exist in many of our States.

The general rule is that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called to testify merely from a comparison of hands.[11] Where, however, the witness has acquired knowledge of the handwriting of the person by having seen him write, he may compare the paper in question with the genuine handwriting of the party, and state his belief arising from both sources.[12] This, it will be seen, is a modification of the first mode, the genuine paper serving to render the witness' memory more reliable. Upon the admissibility of submitting papers to the jury, whether in the case or not, for the purpose of comparing the handwriting, the practice varies in different States. In Alabama,[13] Indiana,[14] Illinois,[15] Kentucky,[16] New York,[17] North Carolina, Rhode Island, Texas,[18] Virginia and Wisconsin,[19] such submission is not allowed, while in Connecticut,[20] Iowa (under the code), Maine,[21] Massachusetts,[22] and Vermont,[23] a different rule prevails. Even in the States in which the more rigid general rule prevails, it has been relaxed in two cases: 1. When in case of antiquity more direct proof fails; 2. When other writings, admitted to be genuine, are already in the case. In fact, the prevailing rule in America at the present time, barring the provisions for judges of the handwriting, is quite similar to the French, and is well stated in a Michigan decison: "Where a signature is in question, witnesses may be allowed to compare it with a genuine signature to any paper already in the case, and to express an opinion, whether they are in the same handwriting. But they can not be allowed to compare it with a signature not admitted or established, and where the result might be to raise a collateral issue, as to the genuineness of such other signature."[24] The English rule, as founded upon statute,[25] is more similar to that which prevails in Massachusetts and other New England States, and is thus stated by Stephen: "Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine, is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."[26] Everything considered, the rule which confines the papers, with which comparison is to be made, to those already in the case, and thus avoids the raising of collateral questions, seems far preferable, and is the one upon which American courts are likely to agree.

SHELDON G. KELLOGG.

[10] Part I, l. 2, tit. 10, sec. 200.
[11] Strother v. Lucas, 6 Pet. 763; Brooke v. Peyton, 1 Cranch, C. C. 96; Reid v. Hodgson, Id. 491; United States v. Craig, 4 Wash. C. C. 729.
[12] United States v. Larned, 4 Cranch, C. C. 312; Hopkins v. Nimmons, 1 Id. 250. Compare Dunlop v. Silver, Id. 27; Turner v. Foxall, Id. 324.
[13] Little v. Beazley, 2 Ala. 703; Bishop v. State, 30 Ala. 34.
[14] Sharck v. Butsch, 28 Ind. 19.
[15] Jumperz v. People, 21 Ill. 375.
[16] McAllister v. McAllister, 7 B. Mon. 269.
[17] Jackson v. Phillips, 9 Cow. 94.
[18] Hawley v. Gamby, 28 Tex. 211.
[19] Pierce v. Northy, 14 Wis. 9.
[20] Lynn v. Lyman, 9 Conn. 55.
[21] Hammond's Case, 2 Greenleaf, 33.
[22] Homer v. Wallis, 11 Mass. 309; Moody v. Rowell, 17 Pick. 491.
[23] Adams v. Field, 21 Vt. 206.
[24] Vinton v. Pierce, 14 Mich. 287. Compare Ellis v. People, 21 How. Pr. 356; Henderson v. Hackney, 16 Ga. 521; Williams v. Drexel, 14 Md. 56; Van Wyck v. McIntosh, 14 N. Y. (4 Kern.) 439; Dubois v. Baker, 40 Barb. 556; 6 Whart. (Pa.) 284.
[25] 17 and 18 Vict. c. 125, § 27; 28 Vict. c. 18, § 8.
[26] Stephen Dig. Ev., sec. 52.

CONFLICT OF LAWS IN RELATION TO MARRIAGES.

The case of Hines v. McDermott, recently decided in the Court of Appeals of New York, and which will most likely appear in the 82d volume of the New York Reports, raises in a very interesting form the question of validity of foreign marriages, and their relation to the *lex loci contractus*, and *lex domicilii*. The subject has ever been a matter of great dispute, and although there are numerous decisions in the reports bearing upon the question in its different phases, still it can not be said to be definitely settled in all its details; and even where certain points are decisively adjudicated, there is considerable contrariety of opinion as to the grounds upon which the decisions rest.

In the case mentioned above, the plaintiffs claimed to be the widow and children of W. R. Hines, deceased, and, as he died intestate, entitled as heirs and next of kin, to his property. The evidence showed that there had been no formal religious or magisterial ceremony; that the contract of marriage was entered into by mutual consent in *verbis de præsenti*. In the words of Chief Justice Folger, "the testimony * * * shows enough for a jury to find therefrom, that there was the purpose and form of marriage; that there was a refusal on the part of the woman to commence a meretricious cohabitation, and a yielding on the part of the intestate to her demand for marriage, before cohabitation could be had." The question arose whether that constituted a legal marriage. This marriage contract was entered into partly in England, partly in a vessel crossing the English Channel, and finally in France. Chief Justice Folger, in stating the law of New York on the validity of marriage contracts, says: "By the law of this State a man and a woman, who are competent to marry each other, without going before a minister or magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves, to the State and to society as such; and if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances, and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual and *bona fide* marriage." The fact that the marriage, if there was a marriage, had been contracted on French soil, and on a foreign vessel, would have under ordinary circumstances called up the question, which law should govern the construction of the marriage contract, the foreign law, or the law of New York, the *lex loci contractus*, or the *lex domicilii*; but the foreign law was not proven to the court in either instance to be different from the law of New York, and the court refused to presume that it was, and held the marriage valid, in the absence of any proof that it conflicted with the *lex domicilii*. The question of conflict of laws was thus avoided. The presumption raised by the court in this case, that the law of France was not different from the law of New York, rests upon strong grounds, besides the ordi ary legitimacy of legal presumptions in such cases, in the absence of proof to the contrary. The New York law of marriage, prior to the Council of Trent, and the enactment of special statutes, was the universal law of Christendom and the civilized world. The Council of Trent made it necessary to celebrate the marriage with religious ceremonies, or, at least, by the intervention of a priest. The Catholic countries, with the exception of France, recognized the authority of the Council of Trent, and its rules and regulations concerning marriages. France and England later on established similar ones, thus abrogating the old common law of Christendom. Dalrymple v. Dalrymple, 2 Hag. Con. 54, 4 Eng. Ec. 485; Bishop on Mar. & Div., sec. 153, *et seq*; 2 Kent's Comm. 87. In this country it has been generally held that the intervention of a minister or magistrate was unnecessary, unless a legislative enactment required it, and expressly declared any other form of marriage null and void. Such has been the decision of the courts of New York, Pennsylvania, Kentucky, Vermont, Tennessee, Alabama, New Hampshire, Maryland, South Carolina, California, Louisiana and Mississippi. See Fenton v. Reed, 4 Johns. 52; Rose v. Clark, 8 Paige, 574; Starr v. Peck, 1 Hill (N. Y.) 270; Clayton v. Wardell, 4 Comst. 230; Brinkley v. Brinkley, 50 N. Y. 184; Hantz v. Sealy, 6 Binn. 405; Dumaresly v. Fishly, 3 A. K. Marshall, 368; Newbury v. Brunswick, 2 Vt. 15; Northfield v. Plymouth, 20 Vt. 582; State v. Rood, 12 Vt. 396; Pearson v. Howey, 6 Halst. 12; Bashaw v. State, 1 Yerg. 177; Grisham v. State, 2 Yerg. 589; State v. Murphy, 6 Ala. 765; Londonderry v. Chester, 2 N. H. 268; Keyes v. Keyes, 2 Fost. (N. H.) 553; Dunbarton v. Franklin, 19 N. H. 257; Cheseldine v. Brewer, 1 Har. & McH. 152; 10 McCord's Stat., ed. note; Graham v. Bennett, 2 Cal. 503; Patton v. Philadelphia, 1 La. Ann. 98; Holmes v. Holmes, 6 La. 463; Hallett v. Collins, 10 How. (U. S.) 174; Hargroves v. Thompson, 31 Miss. 211; Jewell v. Jewell, 1 How. (U. S.) 219; 2 Kent's Comm. 87; 2 Greenlf. on Evidence, § 460. This being the general law of Christendom, where it is not positively shown by competent evidence that the foreign law is different from the law of the forum or domicil, the natural presumption is that it is in conformity with it. Of late years, the legislatures of the different countries have passed laws for the regulation of marriage, so that the conflict of laws has become more general, and is likely to come oftener before the courts than heretofore, especially in this country, where there are thirty-eight legislatures

acting independently of each other. If in the New York case, the law of France in relation to marriage had been proven by competent testimony, the court would have been called upon to decide by what law the marriage contract should be construed, the *lex loci contractus* or the *lex domicilii*. As a matter of fact, such a marriage would, under the French Code, have been held invalid, the French law requiring more formality of ceremony, than what appeared to have been observed in this case.

The conflict, arising in such a case between the *lex loci contractus* and the *lex domicilii*, is attended by uncertainty and doubt, notwithstanding the number of decisions in which the question has been discussed and adjudged. This conflict, when arising upon ordinary contracts, is difficult of solution, and in case of matrimonial contract, it is still more harassed by considerations of the great injury that might be done to the innocent offspring, as well as the parties themselves, in declaring a ceremony void, which they have considered sufficient to constitute a legal marriage. For this reason the courts in all civilized countries are inclined to uphold marriages, however irregular, if it is possible to do so without doing violence to their own positive laws. It has, therefore, been generally held that a marriage, valid where it is celebrated, is valid everywhere. See Bishop Mar. & Div., sec. 125; Story's Confl. Laws, secs. 79-81; Scrimshire v, Scrimshire, 2 Hag. Con. 395, 4 Eng. Ec. 562; Compton v. Bearcroft, Bul. N. P. 114, 2 Hag. Con 430, 443, 4 Eng. Ec. 578, 585; Herbert v. Herbert, 2 Hag. Con. 271, 4 Eng. Ec. 534; Warrender v. Warrender, 9 Bligh, 89, 111; Munro v. Saunders, 6 Bligh, 468, 473, 474; Commonwealth v. Hunt, 4 Cush. 49; Lacon v. Higgins, 3 Stark. 178; Sutton v. Warren, 10 Met. 451; Swift v. Kelly, 3 Knapp, 257; Wall v. Williamson, 8 Ala. 48; Morgan v. McGhee, 5 Humph. 13; Phillips v. Gregg, 10 Watts, 158; Fornshill v. Murray, 1 Bland, 479; Patterson v. Gaines, 6 How. (U. S.) 550; Dumaresly v. Fishly, 3 A. K. Marshall, 368; 1 Burge Col. & For. Laws, 184, 187; 2 Roper, Husband and Wife, 496; State v. Patterson, 2 Ired. 346; 2 Parsons on Contracts, 593, *et seq*; Briggs v. Briggs, L. R. 5 Prob. & Div. 163; Harvey v. Farney, 5 Prob. & Div. 153. Mr. Bishop states that this rule "covers both the forms by which the marriage is contracted, and, subject to an exception or two mentioned by-and-by, the personal capacity of the parties to enter into marriage." See Bishop, Mar. & Div., sec. 125. So far as it concerns the form or ceremony of marriage, the decisions appear to be unanimous in favor of adopting the *lex loci contractus*. But there is certainly not the same unanimity in its application to the question of capacity of the parties. There are decisions sustaining, but there are also others opposing Mr. Bishop's position. Thus in Conway v. Beasley, 3 Hag. Con. 639, the English court held that a marriage in Scotland, between English parties, following a divorce of one of them, also in Scotland, when they were domiciled in England, is void, on the ground that the divorce is invalid according to English law, and hence the party is incapacitated from entering into a second marriage, even though the divorce is good under the Scotch law, and the parties, therefore, capable under that law of entering into a second marriage. In other words, the capacity of parties to enter into a marriage contract is controlled and governed by the *lex domicilii*. Likewise in Brook v. Brook, 27 Law J. Ch. 400, it was held that English parties can not contract a valid marriage with a deceased wife's sister, in or outside of England, and that such a marriage was void, wherever entered into. So also in Williams v. Oates, 4 Ired. 535, the Supreme Court of North Carolina held that a statutory prohibition, forbidding the marriage of the guilty party in a divorce for adultery, followed him wherever he went. and affected the validity of any marriage contract he might enter into elsewhere. The Supreme Court of Louisiana has also decided, that the marriage of a white person and a negro will not be held valid in that State, even though it is contracted in a country where such marriages are permissible. Dupre v. Ballard, 10 La. Ann. 411. Notwithstanding these decisions however, the weight of authority in this country seems to be in favor of the opposite theory. But the jurists of continental Europe favor the construction of capacity of parties by the *lex domicilii*. 2 Parsons on Contracts, 572; 2 Kent's Comm. 459, n. (b.) and, generally. Livermore's Dissertations, Story's Conflict of Laws; Burge Col. & For. Laws. and Henry on Foreign Law. And it would appear from the cases cited above, that the English courts of late are inclined to the same view. The international law of marriage is, therefore, in a lamentable state of uncertainty. So far as the form of ceremony is concerned, it is clear enough that the courts of all civilized countries agree, that it is governed by the *lex loci contractus*; but where there is doubt as to the capacity of the parties, one court may hold the marriage valid, while another may construe it to be invalid, illegitimize the offspring, and make the cohabitation an adultery. This entire subject of conflict of laws rests upon the comity of nations. The law of one State has, *proprio vigore*, no force or authority beyond the jurisdiction of its own courts. Whatever effect is given to it by the courts of foreign countries or other States is the result of that international comity, which is the product of modern civilization. It is left to each nation to say, how far it will recognize this comity, and to what extent it will be permitted to control its own laws. We have seen that in the case of marriage laws an almost hopeless diversity of opinion has arisen among the jurists of the civilized world. One side maintains that the marriage is invalid, if one of the parties labors under a prohibition, imposed by the laws of his domicil, wherever the marriage is contracted; the other side asserts that the

capacity of the parties is settled by the *lex loci contractus*. The whole discussion among the civilians turns upon the distinction drawn between personal and real statutes. And if this distinction were recognized by the American and English law, the subject might be shorn of its difficulties. Under the civil law, personal statutes (statute here meaning anything which has the force of law), are those which attach to, and establish, the status of the individual, while real statutes define his relation to things, *i. e.*, every species of property. The effect of this distinction is very clearly stated by the court in the case of Saul v. His Creditors, 17 Mart. (La.) 569, 590: "A personal statute is that which follows and governs the party subject to it, wherever he goes. The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove. But it is subject to a real statute of the place where the person subject to the personal should fix himself, or where the property on which the contest arises may be situated." When the question of capacity of parties is applied to ordinary contracts, such as for the sale or purchase of goods, there seems to be an inclination among the civilians to modify their rule, concerning the extra-territorial force of personal statutes, and subject it to the control of the *lex loci contractus*. It would be unreasonable to expect merchants and tradesmen to measure the capacity of the parties dealing with them by a law of which they are entirely ignorant, and which they are not expected to know. But in the case of marriage contracts, the circumstances and inducements are different. The matrimonial contract is one that is not, or should not, be hastily entered into. Sufficient time is given for the consideration of any obstacles in the way of its legal performance, and if one of the parties is not domiciled in the place where the marriage is to be celebrated, a wise prudence would dictate an investigation into his capacity for marriage under the laws of his country, especially if the parties intend to make that country their future home.

Marriage is essentially a status of the individual. It affects the moral and physical development of a people for the better or for the worse, according as the rules and regulations conform more or less to the needs and character of the people, their religion, climatic influence, etc. Each nation possesses certain peculiar characteristics, which always govern and shape their laws. Laws are peculiar to the people which frame them, and laws which may be highly beneficial to the interests of one people, may possibly exert an extremely detrimental influence upon the development of another people. It is peculiarly so with laws regulating marriage. The institution of marriage rests upon economic and natural grounds. In the construction of its marital code, each nation must be presumed to have paid a due regard to the necessities of its people. It cannot be supposed that it has made these laws arbitrarily, and without respect to the eternal fitness of things. Now, inasmuch as the recognition of foreign marriage laws rests upon the comity of nations, which has no binding force, and can be abrogated or sustained, at the will of the legislature of each independent State, is it natural to expect a nation to pay such respect to foreign laws as to break in upon its own economic and domestic arrangements, and declare a marriage of one of its own subjects valid, because it was celebrated in a country whose laws imposed no disability upon him, when that subject is expressly forbidden to enter into any marriage, by whatever form of ceremony, and in whatever country? "Although it be true that, generally, marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws, and their operation on its own citizens, as not to allow them to be evaded by acts in another country purposely to defraud them. It cannot allow such acts abroad, under the pretense that they were lawful there, to defeat its own laws at home, in their operation upon persons within her own territory." Williams v. Oates, 5 Ired. 535. It is not denied that such laws can be so made as to bind the subject wherever he may go. "Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories. And if its subjects sustain hardship in consequence of those restrictions, their nations must bear the blame." Simonin v. Mallac, 2 Sw. & Tr. 67. See, also, Bishop Mar. & Div. sec. 144 *a*. The form of ceremony is properly determined by the *lex loci contractus*; for a departure from the regular ceremony does not, and can not, affect the welfare of a nation, if the parties are not absolutely prohibited from entering into the marriage. But it does seem that a greater uniformity would be attained in the law, if questions concerning the capacity of parties were governed by the *lex domicilii*. Although most of the courts of this country adopt the general rule that the capacity to contract, as well as the form of ceremony, are controlled by the *lex loci contractus*, yet even they find it impossible to apply the rule to every case, and, to obviate the difficulty, establish certain exceptions. Thus Mr. Bishop says: "Where the foreign marriage is not only forbidden by the law of the domicil, but by the law of nature also, as where, for example, it is incestuous by natural law, it is treated as void, both by the courts of the domicil of the party, and in those of all other countries." Sec. 130. But what is the law of nature? Does it not vary according to the moral and religious ideas of each people? Is it not founded upon, and framed to suit, in each instance, the physical and moral needs and requirements of each people? All the marital prohibitions have, or are supposed to have, their foundation in nature, and vary accord-

ing to the nature and condition of the people. The English courts hold that the marriage of a man with his deceased wife's sister is forbidden by the law of nature. The courts of this country, as a general rule, maintain that the law of nature contains no such prohibition. Now, how is it to be decided, which view is correct, except upon the theory, that from the standpoint of each, both are correct in the application of their particular views to their own people? When you attempt to draw any such distinctions between disabilities created by natural, and those by human-made laws, you embark upon a sea of vexatious dispute, and harass the already difficult subject by still greater uncertainty and doubt.

The course this question has taken in the courts and legislature of Massachusetts is peculiarly instructive. In Massachusetts a white person and a negro could not lawfully contract a marriage with each other. Two such parties went, for the express purpose of evading this law, into Rhode Island, where such marriages are permitted, were married, and immediately returned to Massachusetts. This was the case of Medway v. Needham, 16 Mass. 157. The court held that the marriage, being good according to the law of Rhode Island, the *lex loci contractus*, was good in Massachusetts. In delivering the opinion of the court the chief justice said: "This doctrine is repugnant to the general principles of the law relating to contracts; for a fraudulent evasion of the laws of the country, where the parties have their domicil, could not, except in the contract of marriage, be protected under the general principles. * * * The exception in favor of marriages so contracted must be founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief which would result from the loose state in which people so situated would live." The court was evidently moved to this decision by a generous sympathy for the innocent offspring, and a desire to shield them from the stain of bastardy. It was admitted by the court, that the principle, upon which they rest their decision, is repugnant to the general law of contracts. This case was followed ten years afterwards by that of Putnam v. Putnam, 8 Pick. 433, in which parties, both residents of Massachusetts, and one of them divorced from his first wife for adultery, had gone into Connecticut to be married. The law of Massachusetts prohibited the guilty party in a divorce suit from contracting a second marriage during the life of the other. The parties to this case went, with the express purpose of escaping this disability, to Connecticut, where there was no such prohibitory law. The Massachusetts court held this marriage to be good. Notwithstanding this was a highly penal statute, and consequently raised the presumption, that it was not intended to have an extra-territorial force, the court seemed only constrained by the previous decision in Medway v. Needham, and the grounds of the same, to decide as it did, and apparently thought that it should be otherwise. The court say: "Comity will not require that the subjects of one country shall be allowed to protect themselves in the violation of its laws, by assuming obligations under another jurisdiction, purposely to avoid the effect of those laws." But the court adds: "The law on this subject (*i. e.* validity of such marriages) having been declared by this court ten years ago, in the case before cited, it is binding upon us and the community, until the legislature sees fit to alter it. If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explicitly enact that marriages contracted within another State, which, if entered into here, would be void, shall have no force in this Commonwealth. But it is a subject which, whenever taken into consideration, will be found to require the exercise of the highest wisdom." This decision was rendered in 1829. In 1835 the legislature passed the following enactment: "When any persons, resident in this State, shall undertake to contract a marriage, contrary to the preceding provisions of this chapter, and shall, in order to evade those provisions, and with an intention of returning to reside in this State, go into another State or country, and there have their marriage solemnized, and shall afterwards return and reside here, such marriage shall be deemed void in this State." Rev. Stat. ch. 75, sec. 6. This statute may not cover every case of foreign marriage in foreign countries by citizens of Massachusetts, who are forbidden by its laws to marry, but it stamps with its disapproval the doctrine that the *lex loci contractus* controls such marriages as to the capacity of parties so far as to remove any express statutory disabilities imposed by the law of the domicil.

As regards the form of ceremony, it is now the growing disposition of the legislatures to require the celebration of marriage by civil rites, and to make compliance with the law obligatory. Thus, in a number of European countries, notably the German Empire, no marriage is valid, unless the ceremony is performed by a civil magistrate. The sacramental or religious character of marriage is not recognized, and the right of the priesthood or clergy to perform a legal civil marriage is taken away. In this country a number of State legislatures have passed laws, laying down a certain form of ceremony, which must be complied with, and in some instances requiring licenses from the State or municipal authorities before the marriage can be legally solemnized. These are wise steps in the right direction, and could be followed with profit by every legislature. Marriage affects so materially the varied interests of a community, and an illegal marriage is so fraught with disastrous consequences to all parties concerned, that it is but wise to define by legislative enactment what does, and what does not, constitute a legal marriage. Care should, however, be taken that these enactments conform to, and do not conflict

with the general and prevailing doctrines of international comity in its relation to foreign marriages.

C. G. TIEDEMAN.

FOURTEENTH AMENDMENT — CIVIL RIGHTS—TRIAL BY JURY.

NEAL v. DELAWARE.

Supreme Court of the United States, October Term, 1880.

1. The petition of the plaintiff in error—a man of color, indicted for rape in one of the courts of Delaware—for the removal of the prosecution into the Circuit Court of the United States, was properly disregarded.

2. The Constitution of Delaware, adopted in 1831 (and the words of which have never been changed), gave the right of suffrage (with a few special exceptions) to free white male citizens. And the statute of the State (adopted in 1848 and never repealed), restricts the selection of jurors to those qualified to vote at a general State election.

3. The legal effect of the adoption of the amendments to the Federal Constitution, and the laws passed for their enforcement, was to annul so much of the State Constitution as was inconsistent therewith, including the provision confining suffrage to the white race; and, thenceforward, the jury statute was enlarged, in its operation, so as to render colored citizens, otherwise qualified, competent to serve on juries in the State courts.

4. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes.

5. In this case, that presumption is strengthened and becomes conclusive, not only by reason of the direct adjudication of the State court, recognizing the modification of the State Constitution by reason of the amendments to the National Constitution, but by the entire absence of any statutory enactments, since the adoption of the amendments, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, their legal effect upon the Constitution and laws of the State.

6. Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that the case was embraced by section 641 of the Revised Statutes, and, therefore, removable into the Circuit Court of the United States.

7. The alleged exclusion from the grand jury that found, and from the petit jury that was summoned to try this indictment, of citizens of the African race because of their race, did not result from the Constitution or laws of the State as expounded by its highest judicial tribunal; and, consequently, the accused was not entitled to the removal of the prosecution into the circuit court. Such exclusion, however, if made by the jury commissioners, without authority derived from the Constitution and laws of the State, was a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error to the State court.

8. Upon the showing made by the accused, the motions to quash the indictment and the panels of jurors should have been sustained.

9. The doctrines announced in Strauder v. West Virginia, Virginia v. Rives, and *Ex parte* Virginia (100 U. S. 303, 313 and 339), are re-affirmed.

In error to the Court of Oyer and Terminer of New Castle County, State of Delaware.

Mr. Justice HARLAN delivered the opinion of the court:

The plaintiff in error, a citizen of the African race, was, on the 11th of May, 1880, indicted in the court of general sessions of the peace and jail delivery of New Castle County, in the State of Delaware, for the crime of rape—an offense punishable, under the laws of that State, with death. The indictment, upon writ of *certiorari* sued out by the attorney-general of the State, was removed for trial into the court of Oyer and Terminer for the same county—the highest judicial tribunal of Delaware, in which the decision of such a case could be had. In the latter court, the accused, by counsel specially assigned for his defense, filed a petition, verified by his oath, for the removal of the prosecution into the circuit court of the United States for the District of Delaware.

The general grounds alleged for removal were that the grand jurors who returned the indictment, and the petit jurors who were summoned to try the case, were of the white race exclusively; that all citizens of the African race, though otherwise qualified, had, by virtue of the Constitution and laws of the State, been excluded from the lists of grand and petit jurors, because of their race and color; that, in fact, persons of that race, though otherwise qualified, have always, in said county and State, been excluded, because of their color, from service on juries; and, consequently, that the accused had been, and, in the trial of his case would be, denied the equal protection of the laws, and the full and equal benefit of all laws and proceedings in that State for the security of his person, as is enjoyed by the white race. The removal was denied, as were motions subsequently made in behalf of the accused, to quash the indictment and the panels of grand and petit jurors. A trial was had before a jury composed wholly of white persons, and, a verdict of guilty having been returned, it was, on the 27th of May, 1880, adjudged that the accused suffer death by hanging. From that judgment this writ of error has been prosecuted. The assignments of error are numerous, but they are all embraced by the general proposi-

ion that the court erred as well in proceeding with the trial after the petition for removal was filed, as in denying the motions to quash the indictment, and the panels of jurors.

The first question to which our attention will be directed relates to the assertion, by the accused, of the right of removal under section 641 of the Revised Statutes. That section declares that, "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of the citizens of the United States, * * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State court shall cease," etc. In Strauder v. West Virginia, 100 U. S. 303; Virginia v. Rives, Ib. 313, and *Ex parte* Virginia, Ib. 339, that section of the Revised Statutes was the subject of careful examination, in connection with section 1977, which declares that "all persons within the jurisdiction of the United States shall have the same right, in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like pains, penalties, taxes, licenses and exactions of every kind and no other." We also considered the validity and scope of the act of Congress, approved March 1, 1875, which, among other things, declares that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States, or of any State, on account of race, color or previous condition of servitude." 18 Stat., pt. 3, 336. In those cases it was ruled that these statutory enactments were constitutional exertions of the power to pass appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, as we held, to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that, while a State, consistently with the purposes for which that amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens, of participating, as jurors, in the administration of justice, is a discrimation against the former inconsistent with the amendment, and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and, that such exclusion of the black race from juries because of their color was not less forbidden by law, than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of their color. But it was also ruled, in the cases cited, that the constitutional amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race.

The essential question, therefore, is whether, at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the Constitution and laws of Delaware, excluded from service on juries because of their color. The court below, all the judges concurring, held that no such exclusion was required or authorized by the Constitution or laws of the State, and, consequently, that the case was not embraced by the removal statute as construed by this court.

The correctness of this position will now be considered. The Constitution of Delaware, adopted in 1831 (the words of which, upon the subject of suffrage, had not been changed when the petition for removal was filed, nor since), restricts the right of suffrage at general elections to free white male citizens, of the age of twenty-two years and upwards, who had resided in the State one year next before the election, and the last month thereof in the county where he offers to vote, and who, within two years next before

the election, had paid a county tax, which shall have been assessed at least six months before such election—the prerequisite of a payment of tax being dispensed with in the case of free white male citizens between twenty-one and twenty-two years of age, having the prescribed residence in the State and county. The only persons excluded by that Constitution from suffrage are those in the military, naval or marine service of the United States, stationed in Delaware, idiots, insane persons, paupers, and those convicted of felonies. The statutes of Delaware, adopted in 1848, and in force at the trial of this case, provided for an annual selection, by the levy court of the county, of persons to serve as grand and petit jurors, and from those so selected the prothonotary and clerk of the peace were required to draw the names of such as should serve for that year if summoned. They further provided that all qualified to vote at the general election, being 'sober and judicious persons," shall be liable to serve as jurors, except public officers of the State or of the United States, counselors and attorneys at law, ordained ministers of the gospel, officers of colleges, teachers of public schools, practicing physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons over seventy years of age. It is thus seen that the statute, by its reference to the Constitutional qualifications of voters, apparently restricts the selection of jurors to white male citizens, being voters, and sober and judicious persons. And although it only declares that such citizens shall be liable to serve as jurors, the settled construction of the State court, prior to the adoption of the Fifteenth Amendment, was that no citizen of the African race was competent, under the law, to serve on a jury. Now, the argument on behalf of the accused is, that since the statute adopted the standard of voters as the standard for jurors, and since Delaware has never, by any separate or official action of its own, changed the language of its Constitution in reference to the class who may exercise the elective franchise, the State is to be regarded, in the sense of the amendment, and of the laws enacted for its enforcement, as denying to the colored race within its limits, to this day, the right, upon equal terms with the white race, to participate as jurors in the administration of justice—and this, notwithstanding the adoption of the Fifteenth Amendment, and its admitted legal effect upon the Constitutions and laws of all the States of the Union. But to this argument, when urged in the court below, the State court replied, as does the attorney-general of the State here, that although the State had never, by a convention, or popular vote, formally abrogated the provision in its State Constitution restricting suffrage to white citizens, that result had necessarily followed, as matter of law, from the incorporation of the Fourteenth and Fifteenth Amendments into the fundamental law of the nation; that since the adoption of the latter amendment neither the legislative, executive, nor judicial authorities of the State had, in any mode, recognized, as an existing part of its Constitution, that provision which, in words, discriminates against citizens of the African race in the matter of suffrage; and, consequently, that the statute prescribing the qualification of jurors by reference to the qualifications for voters, should be construed as referring to the State Constitution, as modified or affected by the Fifteenth Amendment.

The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty and property, and to the equal protection of the laws, was the primary object of the recent amendments to the national Constitution. Its solution is confessedly attended by many difficulties of a serious nature, which might have been avoided by more explicit language in the statutes passed for the enforcement of the amendments. Much has been left by the legislative department to mere judicial construction. But upon the fullest consideration we have been able to give the subject, our conclusion is that the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from its Constitution and laws. Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was. itself, enlarged, in its operation, so as to embrace all who by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all its citizens and every department of its government. and to be enforced within its limits, without reference to any inconsistent provisions in its own Constitution or statutes. In this case, that presumption is strengthened, and, indeed, becomes conclusive, not only by the direct adjudication of the State court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication, since the adoption of the Fifteenth Amendment, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, the binding force of that amendment and its effect in modifying the State Constitution upon the subject of suffrage.

This abundantly appears from the separate opinions in the case, of the judges composing the court of Oyer and Terminer. Comegys, C. J., alluding to the Fifteenth Amendment, and the act of March 1, 1875, said:

"Returning to the point—that our laws forbid the selection of colored persons as jurors. We answer this by saying we have no such laws. * * * The Fourteenth Amendment, therefore,

and the act of 1875, passed by Congress as appropriate legislation for its enforcement, or either, are superior to our State Constitution, and it had to give way to them, and it did so give way, and was repealed, so far as the word 'white' is mentioned therein as a qualification for a voter at a general election, as soon as the amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this State from that time forth. Ever since the last civil rights bill was passed by Congress, negroes have been admitted as witnesses in all cases, civil and criminal, tried in our courts; whereas, before, they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is, then, an excision or erasure of the word white in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there. We have, then, no law in this State forbidding the levy court to select negroes as jurors, because they are negroes, if in their judgment they are otherwise qualified." Wales, J., said: "We know, from actual and personal knowledge of the history of the times, that since the adoption of the Fifteenth Amendment to the Federal Constitution, the provision in the Constitution of Delaware, limiting the right to vote to free white male citizens, has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this State with the same freedom as the whites. It is not necessary to prove this fact. * * * But there is really no difficulty in reaching the conclusion that under the law regulating the selection of jurors the colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect, and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward and make one unvarying standard for the qualification of a juror, to-wit: that he should be qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever, thereafter, might become qualified voters in the State, whether by virtue of amendment to its Constitution, or by virtue of 'the supreme law of the land,' that overrides and supplants State Constitutions and State laws, *eo instanti* became qualified for selection and service as jurors. * * * The right secured to the colored man under the Fourteenth Amendment and the civil rights laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no State law can for that cause alone exclude him from the jury-box, nor can a State officer be permitted, in the performance of his official duties, to purposely keep the colored man off the jury lists." Houston, J., concurred in the opinion of the other judges, and expressed his surprise that the petition for removal contained the statement that the colored man is not a voter in Delaware by its Constitution and laws. That, he said, "is not true, and ought not to be asserted; because there is not a lawyer of any political party, that has ever doubted, since the adoption of the Fourteenth Amendment to the Constitution of the United States, that the word 'white' in our Constitution was entirely stricken out. That goes to the root of the whole matter, and there is no discrimination in the Constitution or laws of our State against colored men as jurors."

There is another consideration upon this branch of the case which is entitled to weight. In some of the States, particularly those in which slavery formerly existed, no alteration of the Constitution was possible except in the particular mode prescribed, unless, indeed, the people assumed to disregard the express limitation which their own fundamental law imposed upon the power of amendment. If the Constitution is obeyed, no alteration of its provisions could, in some of the States, be effected short of several years. And if the position taken by counsel be correct, so long as the mere language of a State Constitution, as originally framed and adopted, is inconsistent with that equality of civil rights secured by the recent amendments to the Federal Constitution, every civil suit or criminal prosecution in that State, against a colored man, would be removable, under section 641 of the Revised Statutes, into the circuit court of the United States, although the State, by all its organs of authority—legislative, executive and judicial—should recognize, without reservation or qualification, the legal effect as well of the amendments, as of the statutes enacted to enforce them. We can not believe that section was intended by Congress to be so far-reaching in its results, or that its reasonable construction requires us to hold that the State of Delaware, by its Constitution and laws, denies or prevents, or impairs the enforcement, in its judicial tribunals, of rights secured by any law providing for the equal civil rights of citizens of the United States. Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State, as, under the Constitution and within the meaning of section 641, would authorize a removal of the suit or prosecution to the circuit court of the United States. No such case is presented here. The discrimination complained of does not result from

the Constitution or laws of the State, as expounded by its highest judicial tribunal; and, consequently, it could not be made manifest until after the trial commenced in the State court. The prosecution against the plaintiff in error was not therefore, removable into the circuit court, under section 641. In thus construing the statute, we do not withhold from a party claiming that he is denied, or can not enforce in the judicial tribunals of the State, his constitutional equality of civil rghts, all opportunity of appealing to the courts of the Union for the redress of his wrongs. For, if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, at the trial in the State court, or in the execution of its judgment, any right, privilege, or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review.

What we have said leads to the conclusion that the State court did not err in disregarding the petition for removal. The remaining question relates to the denial of the motion to quash the indictment and the panels of jurors. The grounds upon which the motions are placed were formally and distinctly stated, and are fully set out in the bill of exceptions. They were the same as those assigned in the verified petition filed by the accused for the removal of the prosecution into the circuit court of the United States, *viz.*: that from the grand jury that found, and from the petit jury that was summoned to try the indictment, citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panels, because of their race and color; and that, in fact, persons of that race, though possessing all the requisite qualifications, have always, in that county and State, been excluded because of their race from serving on juries. That colored persons have always been excluded from juries in the courts of Delaware was conceded in argument, and was likewise conceded in the court below. The chief justice, however, accompanied that concession with the remark in reference to this case, "that none but white men were selected is in no wise remarkable in view of the fact, too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity, to sit on juries." The exceptions, he said, were rare. Although, for the reasons we have given, the accused was not entitled to a removal of this prosecution into the circuit court of the United States, he is not without remedy if the officers of the State, charged with the duty of selecting jnrors, were guilty of the offense charged in the defendant's petition. A denial, upon their part, of the right of the accused to a selection of grand and petit jurors without discrimination against his race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in Virginia v. Rives, "the court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court," and, ultimately in this court upon review. 105 U. S. 322. We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, can not claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, "that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them because of their color." So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motion to quash the indictment and the panels of jurors.

We are informed by the bill of exceptions that when the motions to quash were made, it was agreed between the State, by its attorney-general, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal "should be taken and treated, and given the same force and effect, in the consideration and decision" of the motions, "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter-affidavits were filed in behalf of the prosecution. Nor does it appear that, at the trial, the State, by its attorney-general, controverted, in any form, the allegation, made with the utmost directness, that the officers of the State had purposely excluded from the juries, because of their color, citizens of the African race, qualified to perform jury service. Nor does the bill of exceptions disclose any suggestion or intimation, upon the part of the State, of any objection to the prisoner's affidavit as evidence in support of the motions. Under these circumstances, without any evidence, by affidavit, or otherwise, upon the part of the State, the motions to quash were submitted for determination. They were overruled, upon the ground that "no evidence had been produced, or offered by the accused" to prove that the alleged exclusion of colored persons from the juries was because of their color. The court said that such fact of exclusion could not be established by the circumstance that no persons of the African race were, in fact, on the panels; but "should have been proven affirmatively on the part of the defendant, and by competent testimony, outside of his affidavit, before said motions to quash could be granted."

Thereupon—the bill of exceptions proceeds—before the trial commenced, and before the accused had even been arraigned, or had pleaded to the indictment, he further moved the court to permit him to produce, as witnesses, in support

of the motions to quash, "the commissioners of the levy court, and the clerk and bailiff of said levy court, and that the court should issue by its clerk subpœnas for said persons as witnesses to testify as aforesaid." To the granting of that motion the attorney-general of the State objected, and his objection was sustained. The bill shows that the motion to go into further proof was denied "on the ground that full time to produce such witnesses to make such proof had existed before the motion was heard; that application for leave to summons witnesses to support a motion which had been argued and refused, because of want of proof, when sufficient time had existed for its production, was without precedent in the court of Oyer and Terminer in this State, and, therefore, in this case, the motion must be treated as coming too late to be granted."

It may be argued that the ruling of the court whereby the prisoner was denied the privilege, after the motions to quash were overruled, and before the trial commenced, of making further proof in support of the charge that both grand and petit juries had been selected in violation of the Constitution and laws of the United States, is not the subject of review in this court. Without discussing that proposition, we may remark, with entire respect for the court below, that the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake, and who was too poor to employ counsel of his own selection. If it be suggested that the commissioners, when summoned, could not have been compelled to testify, it may be answered that they might not have claimed any such exemption. But that objection, however plausible or weighty, did not apply to the clerk and bailiff of the levy court. The clerk of the court of Oyer and Terminer was himself, as we are advised by the opinion of the chief justice, the clerk of the levy court, attending its sessions, and assisting in the transaction of its business. That officer, we may presume was present in court when the application to examine him as a witness was made. He and the bailiff were in a position, perhaps, to clearly sustain or clearly disprove the allegation that the grand and petit juries were organized upon the principle of excluding therefrom all colored persons, because of their race—a charge involving the fairness and integrity of the whole proceeding against the prisoner.

But passing by this ruling of the court below as insufficient, in itself, to authorize a reversal of the judgment, we are of opinion that the motions to quash, sustained by the affidavit of the accused, which appears to have been filed in support of the motions, without objection to its competency as evidence, and was uncontradicted by counter-affidavits, or even by a formal denial of the grounds assigned, should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly, or by not making it at the proper time. No such objection appears to have been made by its attorney-general at the trial. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit "in the consideration and decision" of the motions implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice. The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State—although its colored population exceeded 20,000 in 1870, and in 1880 exceeded 26,000, in a total population of less than 150,000—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed, was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte* Virginia, we said, and now repeat, that "a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning." *Ex parte* Virginia, 100 U. S. 847.

The judgment of the court of Oyer and Terminer is reversed, with directions to set aside the judgment and verdict, as well as the order denying the motion to quash the indictment and panels of jurors, and for such proceedings, upon a further hearing of those motions, as may be consistent with the principles of this opinion.

Mr. Chief Justice WAITE dissenting:—I am unable to concur in this judgment. We said, in Virginia v. Rives, 100 U. S. 322, that the mere

fact that persons of color had not been allowed to serve on juries where colored men were interested, was not enough to show that the defendants had been discriminated against because of their race. That is all that was shown in this case on the motion to quash, except that the accused swore in an affidavit that the exclusion of colored men from juries in Delaware had been because of their race. I can not believe that the refusal of the court, on such an affidavit unsupported by any evidence, to quash the indictment and quash the panel of jurors, because the defendant had been discriminated against on account of his race, was such an error in law as to justify a reversal of the judgment. As the motions had once been submitted on the affidavit of the defendant alone and decided, it rested in the discretion of the court to allow a rehearing and permit further evidence to be introduced. The refusal of the court to do so can not, as I think, be assigned for error here.

Mr. Justice FIELD also dissented.

SUCCESSIVE NEW TRIALS—MANDAMUS—APPEALS—SUPERSEDEAS.

STATE v. HORNER.

St. Louis Court of Appeals, May, 1881.

1. Where a statute declares that only one new trial shall be allowed either party, except when the jury shall have erred in a matter of law, or been guilty of misbehavior, the trial court has no power to set aside, for excessive damages, a second verdict for the same party, or to compel a *remittitur* of part of the verdict.

2. When the trial court approves a second verdict, except as to its amount, and requires a *remittitur* on penalty of granting a new trial, *mandamus* will lie to compel the court to proceed to enter judgment.

3. The error of law or misbehavior by the jury, which will justify setting aside a second verdict, must have occurred at the trial when the second verdict was rendered; such error or misbehavior at a former trial is insufficient.

4. An amendment of the petition in the trial court, after the first and before the second verdict, whereby the former issues are not enlarged and the cause of action is not changed, will not prevent the application of the statute concerning second new trials.

5. The statute of Anne concerning *mandamus* requires the issue of the peremptory writ "without delay;" this was construed in England (before its enactment in Missouri), to preclude a *supersedeas* of the peremptory writ; and where the general State law for appeals merely permits a "stay of execution," on giving bond, etc., no appeal can operate to stay a peremptory *mandamus*, which is an extraordinary writ of a very different character from an execution.

Original proceedings in *mandamus*.

Marshall & Barclay, for relators; *Noble & Orrick*, for respondent.

An alternative writ having issued upon *ex parte* application of relators, the respondent demurred thereto, and on the demurrer,

THOMPSON, J., delivered the opinion of the court:

This is a petition for *mandamus* to compel the respondent, who is a judge of the Circuit Court of the City of St. Louis, to enter judgment in a cause, pending before him, in which the plaintiffs have, on a third trial, recovered a verdict for $3,500 damages. The grounds of the application are that there have been three trials, in the first and last of which verdicts were rendered for the plaintiffs, the second having been a mis-trial; that, notwithstanding this, the respondent, in disregard of sec. 3705 of the Revised Statutes, has entered an order to the effect that if plaintiffs will remit $1,500 of the verdict, he will overrule the motion for a new trial, otherwise the motion will be granted. The statute is as follows: "Only one new trial shall be allowed to either party, except: First, where the triers of the fact shall have erred in a matter of law; second, when the jury shall be guilty of misbehavior." In Hill v. Wilkins, 4 Mo. 86, it was held that where the judge of a circuit court assumes to set aside a second verdict for a cause not permitted by this statute, the Supreme Court will, by *mandamus*, compel him to enter judgment upon the verdict. In later cases, *mandamus* is said to be the only remedy applicable to such a case. Boyce v. Smith, 16 Mo. 317; Leahy v. Dugdale, 41 Mo. 517. It is familiar law, that *mandamus* will not lie in any case, unless the right of the petitioner to invoke this remedy is clear. To entitle the petitioner to this remedy in the present case, it is therefore apparent that he must make it appear, first, that there have been two new trials upon the same cause of action, and upon substantially the same issues (Boyce v. Smith, 16 Mo. 321), in both of which the petitioners have had a verdict in their favor; secondly, that the court below has set aside the last verdict, although it is of opinion that the jury have not erred in matter of law and have not been guilty of misbehavior. And the questions which we have to determine are, Do these things appear in this case?

1. Has the petitioner had two verdicts on the same cause of action, and on substantially the same issues? It appears that the action in the court below was for damages for malicious prosecution in wrongfully suing out an attachment against the petitioners. At the first trial, the petitioners had a verdict in their favor for the sum of $1,508.07, which verdict was set aside and a new trial granted. Before the second trial, the plaintiffs, by consent, and without any formal entry on the records of the court, amended their petition. The defendants made no corresponding amendments in their answer, but the parties went to trial, the second time, on the issues made by the petition as thus amended, and the answer which had been previously filed. The amendment to the petition consisted in striking out cer-

tain allegations with regard to the nature of the damages which the plaintiff had sustained, and inserting others, the aggregate of damages claimed in the amended petition remaining the same as in the original petition. The nature of the amendment will best be seen by a comparison between the matter stricken out and the matter inserted.

The matter stricken out read as follows: "That, by reason of said suit, the credits and money of plaintiffs to the amount of several thousand dollars were attached, and they were deprived of their use for a long time, their credit was impaired and damaged, their business and reputations were greatly injured, and they were obliged to expend and become liable for a large sum of money, in and about the defense of said unfounded suit; and in these, and many other respects, they were and are damaged by reason of said premises, in the sum of $5,000." The matter inserted read as follows: "That, by reason of said suit and attachment, plaintiff's credit as such firm was impaired and damaged, and their business was greatly injured, and they are also entitled, by reason of said premises, to exemplary damages from defendant herein, in all, as aforesaid, in the sum of $5,000 damages." It can not be denied that this amendment worked a substantial change in the issues to be tried; but, how did it work a change? It narrowed the plaintiffs' claim by eliminating certain allegations of special damages, without enlarging it by substituting any new claim. It amounted to an abandonment by the plaintiffs of their claim for special damages for being deprived of the use of the money attached, and for being forced to expend large sums of money in the defense of the attachment suit. With these exceptions, it claimed the same damages as before, with an additional claim for exemplary damages, the whole not to exceed $5,000, the aggregate of damages previously claimed. It is familiar law, as stated in the respondent's brief, that special damages, being such damages as are not in law presumed to flow as a necessary consequence from the wrongful act complained of, must be averred in the plaintiff's declaration or petition, and proved as laid. And where, as in this case, the plaintiff avers, and the defendant denies, that he has sustained such damages, the question whether such damages were, in fact, sustained, is one of the issues to be tried. On the other hand, it is not necessary, in order to recover exemplary damages, that such damages should be asked for in the declaration or petition; and the prayer for exemplary damages in a petition is mere surplusage, unnecessary matter which has no effect either way on the issues to be tried.

The effect of the amendment was, therefore, nothing more than a *non pros.* by the plaintiffs as to certain items of special damage. It thus appears that every question which could have been raised, and every issue which could have been tried under the pleadings, after the petition was amended, could have been raised and tried under the pleadings, before it was amended. This being so, the change which was made in the issues by the amendment was not of such a nature as to disentitle the plaintiffs to have judgment entered on the second verdict. Railroad Co. v. Hackney, 1 Head, 169. It rather constitutes a stronger reason why they should have such judgment. This position of the respondent is, therefore, not well taken.

2. Does it clearly appear from the petition and the facts, which the parties have agreed upon in the stipulation they have filed, that the respondent refuses to enter judgment upon the second verdict, and threatens to grant a new trial for other causes than error of the jury in matter of law, or misbehavior of the jury. The respondent's counsel insists that it does not, and in support of his contention he makes the following plausible suggestion: "Suppose the evidence showed the actual damages to have been $2 000, the verdict amounting to $3,500, and suppose the court had instructed the jury that, under the evidence, exemplary damages could not be allowed by them, and the jury had misread the instruction, and had understood from it that such damages could be allowed, would not the court, under such circumstances, have had the right to presume that the jury hau committed an error of law in this respect, and that it could be cured by the *remittitur*?" We should answer that this might be so; but we cannot resort to such a supposition on the face of the papers before us, because we think it an improbable supposition. It is indeed a rule of pleading which we think (as we said in the case of Clark v. Thatcher), holds good under any system of pleading, that allegations made in a pleading are, when interpreted, to be taken most strongly against the pleader. But this does not mean, even under the strict rules applicable to a petition for a *mandamus*, that, in the interpretation of a pleading, a court is at liberty to go so far against the pleader as to put upon his words a forced, unnatural, or improbable meaning. It only means that the meaning of the pleader's words will not be extended, by intendment or construction, beyond the natural, legal import of the words themselves. Here it appears from the petition that, the plaintiffs having recovered a second verdict upon the same cause of action, the court has entered the following order: "It is ordered by the court that the motion heretofore submitted herein for a new trial be overruled upon the condition, however, that plaintiffs remit, within five days, the sum of $1,500, part and parcel of the judgment heretofore rendered herein, and if said plaintiffs fail to remit as aforesaid, then that said motion for a new trial be sustained." A fair and natural interpretation of this order is that the respondent, sitting as a judge, is of opinion that the jury have neither erred in matter of law nor been guilty of misconduct, and therefore he will enter a judgment on their verdict to the amount of $2,000, but that he is also of opinion that the verdict is excessive to the extent

of $1,500, and therefore he will grant a new trial—not for error of law, nor misconduct of the jury, but for excess in the verdict, unless the excess is remitted. In the absence of a showing that the respondent gave any other reasons for his decision, we feel bound to hold that such was the meaning of his order. The judges of the circuit court are not bound, in any case, to give reasons for their decisions, although they are at liberty to do so. If on such an application as this, in the absence of any announcement by the judge of his reasons for granting a new trial, it were permissible for us to resort to remote conjecture in order to support the action of the judge, and to take the case out of the statute, we can conceive of no case where a judge grants a second trial without assigning reasons therefor, in which the plaintiffs could invoke an effective remedy by *mandamus*; which, as before stated, the Supreme Court has declared to be the only remedy. If, indeed, the circuit judge was moved by the reason conjectured by his counsel, or by any similar reason, to make the order in question, we apprehend that he will be at liberty to show that fact in his return, and that the fact, if shown, will be a good reason for refusing a peremptory writ. For the rule is well settled and imperative, whether a writ of *mandamus* is asked for to compel the doing of an act by a judicial or by a ministerial officer, that the writ will never go to compel the doing of an act which involves in any substantial degree the exercise o a discretion by the officer. It is only where an act is plainly required to be done by law, and where the law has committed to the officer no discretion to refuse the doing of it, or where his discretion in the premises has been exhausted, that the writ will issue. These are familiar principles, and need not be enlarged upon.

The demurrer to the petition is overruled. The respondent will, on application, be allowed a reasonable time in which to make a return; in default of which a peremptory writ will issue. Judge Bakewell concurs. Judge Lewis did not sit.

After the above opinion, respondent made return, alleging that the first new trial had been granted for error of law on the part of the court in giving instructions and repeating the facts concerning the amendment of the petition after the first verdict. To this return the relators demurred, and on such demurrer LEWIS, J., delivered the opinion of the court:

The respondent makes return to the alternative writ of mandamus, showing in effect, that the first new trial in the case of Albers v. Bartholow, was granted on account of one of the exceptional causes mentioned in Rev. Stat. § 3705, to wit: That the jury erred in a matter of law; and this because of errors committed by the court in the giving and refusing of instructions. The petitioners demur to this return, as setting forth no facts sufficient in law to prevent the issuing of a peremptory writ. We do not understand the statute as making any grounds for the first granting of a new trial an exception to the rule which forbids more than one new trial in favor of the same party. Our interpretation is, that when a party applies a second time for a new trial, he must be able to show that in the last trial, of which he now complains, the jury erred in a matter of law, or were guilty of misbehavior.

The interpretation advanced by the respondent would open the way to an endless succession of new trials for other causes, whenever the first happened to be granted because of error in a matter of law or misbehavior of the jury. The statutory condition or exception would thus be satisfied. This would supersede the limitation of one new trial to the same party, and no limitation whatever would then remain. The causes of the first new trial would furnish a complete answer to every objection against successive applications, however numerous they might be. The only rational interpretation which will give effect to the statute, as manifestly intended by its framers, is that which requires the statutory exceptions, or one of them, to exist with reference to the last previous trial, when a second new trial is to be granted in behalf of the same party. The return also sets up the changes of issues in the cause, substantially as shown in the present petition, and as fully disposed of in our opinion delivered on the demurrer thereto. The demurrer to the return is sustained, and a peremptory writ will issue, as prayed for. All the judges concur.

After the foregoing opinion was filed, respondent applied for an appeal to the Supreme Court, tendered a bond with approved security, and moved for a stay of the peremptory writ of mandamus pending the appeal. Relators also submitted, at the same time, a motion for the immediate issuance of such writ.

On these motions LEWIS, J., delivered the following opinion of the court:

The respondent's motion for an appeal with stay of execution, and the petitioner's motion for a peremptory writ, will be considered together.

We have no hesitation in admitting the respondent's right of appeal to the Supreme Court from the order of this court awarding a peremptory *mandamus* against him. It was held, in *Ex parte* Skaggs, 19 Mo. 339, that such an order made by the circuit court was a proper subject for appeal. The Constitution, art. 6, § 12, authorizes appeals from this court to the Supreme Court in cases where any "State officer" is a party. The respondent, as judge of the St. Louis Circuit Court, is unquestionably a State officer, within the meaning of this provision. The attempted distinction between the court and the judge, designed to avoid an application of this provision to the present proceeding, is futile. The fact that *mandamus* may lie against either the court or the judge, only illustrates how utterly the law repels such a distinction as having any possible influence in ascertaining the rights of the parties. A direction to the court will be nugatory, if it be not obeyed by the judge. A mandate laid upon the

judge for a judicial purpose must find its effect in the proceedings of the court. The distinction is sometimes important with reference to the respective functions that may be performed by the court, or by the judge only; but, for the purposes of the present inquiry, the distinction is without a difference. An appeal was unknown to the common law procedure. It obtained in the civil law practice, and in equity jurisdictions. In its primary application, it takes the whole cause up to the higher tribunal, there to be fully tried anew, without regard to what was done in the lower court. The common law writ of error simply referred a question or questions of law to the superior court, pending whose decision the alternate adjudication remained in abeyance. Thus it is said that the issuing of the writ of error *proprio vigore*, operated a *supersedeas*. Perkins v. Woolaston, 1 Salk. 321; Capron v. Archer, 1 Bur. 340. Prior to the statute of 9 Anne, ch. 20, the return upon the alternative writ of *mandamus* was not traversable. It was taken as absolutely true, and the court proceeded to award or refuse the peremptory writ upon the facts thus presented. No record was made, and no writ of error lay. After the statute which permitted a traverse of the return and other pleadings on either side, it was held in King's Bench that error would lie in *mandamus* as well as in other cases. But the effect was declared to be exceptional. By reason of the peculiar nature and purposes of the proceeding, it was determined that the writ of error would not operate a *supersedeas* of the peremptory *mandamus*. A contrary rule would destroy the efficacy of the writ, and would violate the statutory command, that, in case judgment were given for the *mandamus*, a peremptory *mandamus* should be granted "without delay." Dean v. Dougatt, 1 P. Wms. 348. The same command is incorporated in our statute (Rev. Stats., sec. 3260), and the spirit of the ruling just mentioned appears in all the American adjudications, bearing on that subject. The House of Lords ultimately put a stop to all interferences with the peremptory writ, by deciding that no writ of error will lie upon award of peremptory *mandamus*. 2 Bro. Parl. Ca. 554. It appears to have been uniformly considered, in both England and America, that when a court of competent jurisdiction has solemnly, and in due course of law, awarded a peremptory *mandamus*, any delay in its issuance to be brought about by the party against whom it is awarded, under a claim for a review by a higher court, or upon any ground whatever, would be repugnant to the very nature of the writ, and subversive of its purposes, even if there were no statute commanding that it be granted "without delay." *Mandamus* adjudicates no question of ultimate right in any case. It may determine a question of possession, or may adjust the *status* of parties preliminary to litigation, about their respective rights. For instance, it may compel the issuing of a certificate of election; but this will still leave the right to hold the office open to contest by *quo warranto*. When directed against a judicial tribunal, the writ does not indicate in any way what judgment is to be rendered, or what rights of the litigants respectively are to be upheld or denied. It simply directs that the court proceed to perform its functions, leaving the manner of performance to the judicial discernment, and to the corrective authority of superior tribunals. The writ was devised and extended to prevent disorder from a failure of justice and defect of police. 3 Burr. 1265. In People v. Steele, Edm. Sel. Cas. 564, Judge Edmonds says, with reference to the statutory requirement that the writ be granted without delay: "This is by no means an accident in the statute; it is a wise and necessary provision, and is utterly at war with the claim asserted on the part of defendants," to-wit: that a writ of error upon the award of *mandamus* may supersede the issuing of the writ. The general rule that no *supersedeas* can be recognized upon the award of a peremptory *mandamus* is maintained in the following cases: Pickney v. Hennegan, 2 Strobh. 250; Rex v. Dean, 1 Strange, 536; Strode v. Palmer, Lill. Ent. 248; People v. Steele, Edm. Sel. Cas. 505; Dean v. Dougatt, 1 P. Wms. 348. We find no authoritative decision to the contrary. In Missouri, the appeal in common law cases has, comparatively speaking, but little in common with the ancient appeal in chancery, and under the civil law. It follows closely, in procedure and results, the common law or statutory writ of error. Errors must be assigned in due form, and the appellate review is confined chiefly to questions of law decided by the inferior court. So far, therefore, as any argument may be drawn from analogy, the proper tests are not to be found in the learning concerning appeals in the old books, but are more rationally derived from what relates to proceedings in error. By these tests, as is already shown, no *supersedeas* on general principles can follow an appeal to the Supreme Court in the present case. If anything can delay the issuing of the peremptory *mandamus*, the authority must be found in Rev. Stats., § 3713: "Upon the appeal being made, the court from which an appeal is prayed shall make an order allowing the appeal, and such allowance thereof shall stay the execution in the following cases, and no others: * * * Second, when the appellant, or some responsible person for him, together with two sufficient securities to be approved by the court, shall during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party, in a penalty double the amount of whatever debt, damages and costs, or damage and costs, have been recovered by such judgment, together with the interest that may accrue thereon, and the costs and damages that may be recovered in any appellate court upon the appeal, conditioned," etc. In order to apply this provision to the present case, it must first be settled that a peremptory writ of *mandamus* is an execution upon a judgment within the meaning of the statute. By Rev. Stat., §§ 2335

and 2336, it is provided that, "The party in whose favor any judgment, order, or decree is rendered, may have an execution in conformity therewith. Such execution shall be a *fieri facias* against the goods, chattels and real estate of the party against whom the judgment, order or decree is rendered. * * * *" Upon a comparison of this definition with the limitation of a stay of cases wherein the debt, damages and costs, or the damages and costs, are first secured to the adverse party, it is impossible to conceive that the legislature intended to bring the writ of *mandamus* within the operation of the provisions. According to the authorities also, there is neither judgment nor execution in the case. In People v. Steele, *supra*, it is said: "The denial or grant of a *mandamus* is a mere award of the court, not a strict and formal judgment. 3 Bro. P. C. 178." In 2 Saunders, R. 101, note *a*, it is said: "A writ of error would not lie at common law to review the decisions or judgments of the court of Queen's Bench, or courts of the counties palatine, in respect to writs of *mandamus*, and the proceedings thereon." * * * And the reason given is, that regularly no writ of error doth lie unless there be a judgment or an award in the nature of a judgment. "In the case of the Dean and Chapter, etc., 8 Mod. 28, the writ of error was quashed, and among the reasons given, the court of Queen's Bench said that the right of any person was not determined on a *mandamus*. It gives a remedy where there is a seeming probability for it, and it settles people in their possessions so that they may be able to defend their rights, or by virtue thereof, to bring an action for things incident to the possession; and if a writ of error would lie in such a case, it would entangle all the public acts of annual officers in most corporations and parishes." In the present award of a peremptory *mandamus*, this court does not determine any right in controversy of either party in the litigation before the circuit court. We may well suppose that the learned judge, in obeying the writ, will enter a judgment in favor of the plaintiffs for the sum of $3,500, in accordance with the verdict of the jury. But if he does so, the act will proceed from his own understanding and interpretation of what the law demands, if a judgment is to be entered at all. Should he render a different judgment, this would be no violation of the *mandamus*, but would be correctable only on error or appeal. We do not direct an entry of judgment for $3,500 or for any other sum. Consequently neither that sum nor any other is the subject of our award. The recognizance then in double that sum, which the respondent tenders, bears no relation to any judgment or determination recorded by this court; and especially to none against the respondent himself, who takes the appeal. When it is considered that the judge, in whose name the stay must be asked, has no interest whatever in delay, and that the only party who proposes to profit by it is not a party to this proceeding at all, the absurdity of the demand becomes striking. It asks, in effect, that an appeal in one case shall operate a stay of execution in a different case, and in favor of one who is not a party in the proceeding appealed from. We do not perceive that, even indirectly, the party against whom the circuit court judgment may be rendered, will be affected with any hardship on account of a refusal to stay the peremptory writ. If he shall deem the judgment wrong, his complete remedy lies before him in an appeal with stay of execution under the statute, which will fit his case far better than it does the one now under consideration. On the other hand, if the peremptory writ should be stayed, the adverse party would be deprived of his judgment with all its liens and benefits until the ultimate determination of the *mandamus* case. The recognizance given here would add no security to that judgment when obtained, and in the meantime a change of circumstances and conditions might find it worthless at last.

Our conclusion is that the peremptory writ should issue, notwithstanding the approved recognizance tendered; while the respondent is nevertheless entitled to his appeal to the Supreme Court. The proper orders will be entered accordingly. All the judges concur.

WILL—EXECUTORY DEVISE—CONSTRUCTION.

VAN PRETRES v. COLE.

Supreme Court of Missouri, February, 1881.

A testatrix by her will devised certain property to her niece, the will containing this further provision: "But should she not survive me, or should she die leaving no heirs of her body, then in either such case, this bequest and devise is to lapse and go to my residuary legatee hereinafter named; and it is so to lapse if she fail to have issue of her body, whether she should or should not survive me;" the testatrix dying in 1868, and the niece dying in 1872, leaving no heirs of her body: *Held*, that the property vested in the niece on the death of the testatrix; and the residuary legatee being incompetent to take, the niece took the whole estate freed from the executory devise.

Error to Circuit Court of Washington County.

J. L. Thomas and Brother, for plaintiff in error; *Relfe & Hemmingway*, for defendant in error.

HOUGH, J., delivered the opinion of the court: Marie L. Lamarque died in 1868 leaving a will, the third clause of which, is as follows: "3. I give, bequeath and devise to my niece, Mary Bolduc, the sum of $6,000, and also the tract of land and house on and in which I now reside, together with all of the furniture and household property, inclusive of linen, plate, jewels, pictures, books and so forth, as the same may be found at my death. But should she not survive me, or should she die, leaving no heirs of her body, then, in either such case, this bequest and devise is to lapse and go to

my residuary legatee hereinafter named; and it is so to lapse if she fail to have issue of her body, whether she should or should not survive me."

Mary Bolduc died leaving no heirs of her body. The executor paid the $6,000 to Mary Bolduc, and the heirs now seek to have him charged with that sum in his final settlement, on the ground that the legacy never vested in her.

It is contended on behalf of the plaintiff in error, that the word "lapse," in the clause of the will above quoted, was used by the testatrix in its legal and technical sense; and that as Mary Bolduc died without issue, the property mentioned never vested in her; and as the devise over to the residuary legatee was pronounced void by this court in the case of Kenrick v. Cole, 61 Mo. 572, the property goes to the heirs. An ingenious and plausibleargu me nt has been made in support of this view, but a careful consideration of the phraseology of the clause in question, has satisfied us that this view is rather specious than sound.

It is impossible to resist the inference that the testatrix, by making a bequest and devise to her niece Mary Bolduc, unconnected with any trust or other limitation as to the use thereof, intended to make some provision for her, which might by possibility be capable of vesting in her and be susceptible of enjoyment by her, at some time. If her sole purpose had been to give the property mentioned to the heirs of the body of her niece, it is to be presumed that the devise and bequest would have been made directly to such heirs, and not to their mother. Taking, then, the words: "I give, bequeath and devise to my niece Mary Bolduc," as indicating an intention on the part of the testatrix, that Mary Bolduc should in some contingency become, in fact, a devisee and legatee of the property mentioned, let us see how this purpose would be affected by confining the word "lapse" in the succeeding sentence to its usual legal technical signification. It is quite obvious that, so far as the first member of this sentence is concerned, *viz.*: "But should she not survive me," the word "lapse" can be given its technical meaning without defeating the purpose we have just ascribed to the testatrix. But let us consider this word in connection with the second member of the sentence, and in order thereto let us bring them in juxtaposition, thus: "But should Mary Bolduc die leaving no heirs of her body, then this bequest and devise to her is to lapse and go to my residuary legatee." That is, giving to the word "lapse" the technical meaning of *non vest* (which the plaintiff in error insists it should receive), the bequest and devise to Mary Bolduc shall not vest in her until she shall die and leave heirs of her body. Or, to state the matter in another form, the proposed construction of the word "lapse" would make the testatrix go through the useless formality of making a devise and a bequest to her niece, which in the same clause she declares shall never vest in her. Such a construction would be manifestly absurd. To avoid this absurd conclusion, the counsel for the plaintiff suggests that the meaning of the words, "Should she die leaving no heirs of her body," may be qualified by the last sentence in the clause of the will we are now considering, which is as follows: "And it is so to lapse, if she fail to have issue of her body, whether she should or should not survive me." This sentence, it is argued, may be regarded as showing that it was the purpose of the testatrix, that the estate should vest whenever Mary Bolduc had issue. If this sentence stood alone, such a construction might be supported. But as the phrase "should she die leaving no heirs of her body," can in no possible view be regarded as either ambiguous or elliptical, and as all parts of the clause should be so construed, if possible, as to harmonize and consist with each other, such a construction can not be given to the last sentence. That sentence, as is evident from the use of the words "so to lapse," refers to the preceding one, and is to be interpreted by it. So interpreted, the words "if she fail to have issue of her body" must be held to be synonymous with the corresponding words of the preceding sentence, and as meaning "if she fail to have issue of her body, living at her death." To give to the word "lapse" the meaning contended for by the appellant, would in our opinion contravene the obvious intention of the testatrix and annul a clear, complete and unquestionable bequest and devise to Mary Bolduc. We think this word was employed by the testatrix in a sense broad enough to designate either the falling in of the estate in the event her niece should not survive her, or the falling in of said estate upon the happening of the limitation or condition subsequent, viz, the death of her niece without issue living. The technical signification of the word would be sufficient to correctly characterize the first event; but in view of other parts of the clause, a broader and more comprehensive signification must be given to it, to make it accurately describe the latter. This larger meaning is equally applicable to both events; and because the more restricted meaning is sufficient for one event, it does not follow, as argued by the appellant, that the word should have the restricted meaning also when applied to the other event. As in our opinion the property mentioned in the clause under consideration vested in Mary Bolduc on the death of the testatrix, and as the residuary legatee has been adjudged incompetent to take, Mary Bolduc took the whole estate freed from the executory devise over, 2 Redf. on Wills, 3 ed., p 264, sec. 17, par. 8, 9 and 10.

The judgment of the circuit court will be affirmed. The other judges concur.

ABSTRACTS OF RECENT DECISION.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

IMPORT DUTIES—PAINTINGS ON PORCELAIN—DECORATED CHINA.—This was a suit to recover back duties paid under protest. The bill of exceptions stated it was proven at the trial, that all the goods charged with the duties were "pictures painted by hand, and their value depended on the skill of the particular artist who painted them, and the porcelain ground on which they were painted was only used to obtain a good surface on which to paint, and was entirely obscured from view when framed or set in any manner, and formed no material part of the value of said painting on porcelain, and did not in itself constitute an article of chinaware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings." The collector exacted a duty of fifty per centum *ad valorem* under the clause in schedule B, sec. 2.504, Revised Statutes, relating to "china, porcelain and parian ware, gilded, ornamented or decorated in any manner," while the importer claims they were dutiable at ten per centum *ad valorem* only, under the clause in schedule M, which embraces "paintings and statuary not otherwise provided for." In other words, the collector claimed they were decorated china or porcelain ware, and the importer that they were paintings on china or porcelain. The evidence seems to have left no doubt on this subject, for it is expressly stated in the bill of exceptions to have been proved that the porcelain ground on which the painting was done "did not in itself constitute an article of chinaware." Such being the case, the painting which was done on it did not make it decorated chinaware. Confessedly the goods were paintings done by hand, and as it is not claimed they were "otherwise provided for" than as chinaware decorated, it follows the court was right in directing a verdict in favor of the importer for the difference between ten and fifty per cent. It is a matter of no importance in this case, that the colors used were metallic, and that the pictures were baked to make the colors more firm. If the jury had found a verdict in favor of the defendant, the court should have set it aside as against what is admitted to have been proved. Under such circumstances a judgment will not be reversed on account of a positive instruction to find for the plaintiff: Pleasants v. Fant, 22 Wall. 416. As the bill of exceptions states that the facts on which the case depends were proved, we can not say that the admission in evidence of samples of "similar" importations on which duties had been paid at ten per centum could have prejudiced the collector's case. The question which the court decided was, that the goods were not chinaware, but paintings. Affirmed. In error to the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAITE.—*Arthur v. Jacoby.*

ASSIGNEE IN BANKRUPTCY—RIGHTS AS TO PAPER DUE THE BANKRUPTS HELD AS COLLATERAL.—The facts of this case briefly stated are these: In 1876, the firm of Brunswick Brothers, Stephani & Hart Company was engaged in the business of making and selling billiard tables at Chicago and St. Louis. In August or September of that year this firm agreed to sell the J. M. Brunswick & Balke Company, the stock and branch of the business at St. Louis, for which the purchasing company was to give, when the stock was transferred, its notes of $1,000, each payable three months from date, and the balance of the invoice when taken was to be divided into monthly notes of $1,000 each, the first to fall due four months from date, and one each month thereafter until the whole price was paid. The three notes due three months after date were to be delivered to the selling firm when the transfer of the stock was made, but the others were to be deposited with the International Bank of Chicago, with instructions that they be delivered one month before their maturity. The invoice when taken amounted to $12,000. The stock was transferred and notes executed according to the agreement, September 9, 1876. The three first to fall due were at once handed over to the selling firm, and the others deposited in bank as agreed. The firm of Brunswick Brothers, Stephani & Hart Company was dissolved in September, 1876, and all its assets passed on the dissolution to the firm of Brunswick, Stephani & Hart, which was its successor in the business. On the 16th of September the new firm agreed that the bank might hold the nine notes then in its possession as collateral security for the indebtedness of the firm to the bank, which then existed, or which might thereafter be created. The firm was at the time owing the full amount of the notes, a part, at least, of which was for a debt incurred under a promise to give the notes as collateral when they were obtained. Proceedings in bankruptcy were instituted against Brunswick, Stephani & Hart, on the 29th of November, 1876, and they were adjudicated bankrupts on the 16th of the following December. On the 3d of February, 1877, the other members of the firm of the Brunswick Brothers, Stephani & Hart Company, filed their petition in bankruptcy, and on the same day they were adjudicated bankrupts and made parties to the former proceeding. The J. M. Brunswick & Balke Company paid the notes to the bank as they fell due, and the payments as made were applied to the liquidation of the debt for which they were held as collateral. On the 25th of June, 1877, the assignee in bankruptcy of the bankrupt firms commenced this suit in trover against the bank to recover damages for the unlawful conversion of the notes and the moneys collected thereon. This statement, which is not disputed, shows clearly, as we think, that the court below committed no error in directing a verdict in favor of the bank.

The makers of the notes do not complain of what was done between the bank and the payees. They owed the debt represented by the notes, and have paid it to the bank as it fell due. As the payments were made, they got up their notes. The rights of the assignee against the bank are only such as the bankrupts themselves had when the proceedings in bankruptcy were commenced. That the St. Louis firm owed the debt to the Chicago firm, whether the notes were ever delivered by the bank, or not, under the terms of the deposit, is conceded. That debt was assigned to the bank as collateral. Such is the legal effect of the agreement between the bank and the firm. That gave the bank the right to collect the notes as they fell due, and apply the proceeds to the discharge of the debt, to secure which the transfer was made. This was done more than two months before the proceedings in bankruptcy were begun, and there is no allegation or suspicion of bad faith. This made the title of the bank good as against the creditors of the bankrupts. Certainly, the bankrupts can not call on the bank to return the notes until the debt for which the security was given is paid. No more can the assignee. Affirmed. In error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Chief Justice WAITE. *Bacon v. International Bank of Chicago.*

WILL—PARTNERSHIP—CONTINUANCE AFTER DEATH—LIABILITY FOR PARTNERSHIP DEBTS.—W. H. Walker, a large dealer in liquors, in partnership with his son Frederick, made his will in which he provided that the liquor business should be carried on by his son Frederick under the old firm name, until his youngest child living should arrive at the age of twenty-one years; that his capital and interest in the concern should be continued therein, and should be chargeable for its debts and liabilities, but that his other property should not be so chargeable; that the profits of his interest in the concern should annually be divided among his wife and children. The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt in the proper court. The appellant Jones was made assignee, and very shortly afterwards filed the bill in the present case in the Circuit Court of the United States for the District of Kentucky against the devisees of W. H, Walker's will. The object of the bill is two-fold, namely, to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator. In the recent case of Smith v. Ayres, 101 U. S., 320, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that, unless he had expressly placed the whole, or some other part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See, also, Burwell v. Mandeville's Executors, 2 How., — , and *Ex parte* Garland, 10 Vesey, jr., 109. In the case before us the testator declares, in express terms, that "his capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable." There is no reason in this case for departing from the principles of Smith v. Ayres, *supra*. The dividends were made in pursuance of the will of the testator and family, and honestly made, and when paid did not diminish the capital of the concern. It very fully appears that the insolvency was brought on by accommodation indorsements for others made after the last dividend was paid; that the firm, but for this, would have remained solvent, and that in regard to this none of the defendants were to blame, except Frederick, who being a full partner is liable personally for all the debts of the firm. Moreover, it appears from a stipulation of the parties that none of the debts of the firm were in existence at the time these profits were declared and paid. No creditor whose debt was in existence when these dividends were made was injured. Affirmed. Appeal from the Circuit Court of the United States for the District of Kentucky. Opinion by Mr. Justice MILLER.—*Jones v. Walker.*

SUPREME COURT OF INDIANA.

May, 1881,

PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS INTER SESE.—When an account is to be taken in a partnership, each partner is entitled to be allowed against the other everything he has advanced, or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought, and nothing is to be considered his share but the proportion of the residue on the balance of the account. This proportion of the residue, to which each party is entitled upon final settlement, is obviously what remains to him after all his obligations to the firm, and to the other members thereof, respectively arising out of contract, or articles of partnership, have been fully discharged. Each partner has a specific lien on the parnership stock for moneys advanced by him more than his share for the use of the partnership, and the lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them. 1 Lindley on Partnership, 681. Where part-

ners are in the joint possession of the partnership property in the prosecution of their business as partners, the individual creditors are required to take notice of their respective rights and interests in such partnership property, and of the prior claim which any other person, interested in the business of the partnership, might have against such property. No record of the articles of partnership is necessary to charge individual creditors with notice of such rights and interests and of such superior claims. Where a partner gives a mortgage upon his interest in partnership property, to secure his individual indebtedness, the mortgagee is necessarily put upon his inquiry as to the tenure by which such partner holds an interest in the mortgaged property, and is charged with notice of any prior claim which the other partners may have upon it. Affirmed. Opinion by NIBLACK, J.—*Lewis v. Harrison.*

LAW MERCHANT—NOTE GIVEN FOR A PRECEDENT DEBT—EXTINGUISHMENT.—A promissory note not payable at a bank in this State, and not governed by the law merchant, such as the note sued on in this case, though given for a precedent debt, will not operate as a payment or in extinguishment of the precedent debt in the absence of an express agreement by and between the parties. 58 Ind, 221; 64 Ind. 406. In this case there was no express agreement that the note sued on should operate as a payment of the former note as claimed by appellant. When the payee of a note induces parties to become sureties on the note by an agreement to do certain things, which he afterwards fails and refuses to perform, there is a failure of consideration of the note as between the payee and the sureties. 30 Ind. 22; 33 Ind. 289. Affirmed. Opinion by HOWK, C. J.—*Jeffries v. Lamb.*

DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES FOR KILLING A CHILD.—Action by appellee against appellant for damages for the killing of his child, five years of age. In an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he has sustained, and the proper measure for damages is the value of the child's service from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child made necessary by the injury, funeral expenses and medical services. Thompson on Neg., vol. 2, 1292; Redfield on Neg., sec. 608. To enable the parent, however, to recover full damages for the services of the child during minority, such damages must be especially declared for and demanded. 1 E. D. Smith, 453. In this case the jury granted a verdict of $1,800. This was excessive in view of the fact that there was no evidence tending to show loss of service, and that the complaint did not constitute a demand for the loss of future services of the child. Reversed. Opinion by NIBLACK, J.—*Pennsylvania Company v. Lilly.*

RECENT LEGAL LITERATURE.

DILLON'S MUNICIPAL CORPORATIONS. Commentaries on the Law of Municipal Corporations, by John F. Dillon, LL.D., Professor of Real Estate and Equity Jurisprudence in Columbia College Law School; Late Circuit Judge of the United States for the Eighth Judicial Circuit, and formerly Chief Justice of the Supreme Court of Iowa. Third edition, revised and enlarged. 2 volumes. Boston, 1881: Little, Brown & Co.

The general scope and excellence of this work, and the reputation of the author, and the peculiar reasons for his capacity to speak authoritatively upon this branch of the law are so well known to the whole country as to render it unnecessary for us to enter into any extended discusssion of the merits of the plan of the work and its execution. Its position in the legal literature of the country, has been long since fully established and acknowledged. Of this, the third edition, Judge Dillon says, in the preface, "The reported decisions to December 1, 1880, have all been diligently examined, and the results of such an examination wrought into the texture of the present edition. This has necessarily increased its size, and correspondingly, it is hoped, its value. More than 200 new sections have been written, and over 3,000 additional cases cited. Every part has been gone over with conscientious care, and there is scarcely a section in which, either in the text or the notes, additions and changes have not been made."

NOTES.

——The June number of the *North American Review* is an unusually interesting one. The articles entitled respectively, "Our Future Fiscal Policy," "The Patrician Element in American Society," and "Shall Americans own Ships?" all deserve a careful reading. Persons interested in archæology will enjoy reading "The Ruins of Central America," the eighth instalment of an excellent series of articles upon that subject, and "Prehistoric Man in America," by Prof. Edward S. Morse, in which a fascinating subject is treated in a most attractive manner. "A New Phase of the Reform Movement," and "Vaccination" are successful discussions of live questions of the day. "The Color Line," by Frederick Douglass, is of value as being a statement of real or supposed race grievances by one of the aggrieved. The article of particular interest to the legal profession, however, is a paper entitled "The Right to Regulate Railway Charges," by J. M. Mason, in which a much discussed legal question is put in such a way as to be of interest, and intelligible to the general reader.